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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 232

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H. W. KELLEY, ET AL.,

*Petitioners,*

*vs.*

EVERGLADES DRAINAGE DISTRICT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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*To Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Petitioners, H. W. Kelley, Renata Titus; Renata M. Titus and Stephen Titus, by James C. Titus, their guardian ad litem; James C. Titus, as such guardian ad litem; Kathleen Wall and Tudor A. Wall, respectfully show this Court:

## I.

### Statement of the Matter Involved.

This is a Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit, to

review a decision whereby that Court (R. 215) affirmed an order denying motions which attacked the jurisdiction of the District Court in a municipal composition proceeding under Chapter IX of the Bankruptcy Act.

Petitioners contend that when the Petition for Confirmation was filed, and also when successive orders were entered approving the Petition for Confirmation as properly filed, the District Court did not have jurisdiction of the subject matter of the proceeding, because the Plan of Composition had not been accepted in writing by creditors owning at least 51% in amount of the securities affected by the plan, as required by Sec. 83(a) of the Act. They further contend that the constructive process issued under these circumstances was void, and that the District Court did not have jurisdiction of the persons of five appellants who did not appear generally.

On June 13, 1941, Respondent filed in the District Court a Petition for Confirmation of a Plan of Composition thereto attached as Exhibit "A" (R. 1-34). The petition alleged that the Plan had been accepted in writing by creditors owning more than 51% in amount of the indebtedness affected (R. 2). There was also attached to the petition the "list of all known creditors" required by Sec. 83(a), "showing separately those who have accepted the plan" (R. 35-83). The Ranson-Davidson Co. was the only creditor shown as having accepted (R. 35-70).

Respondent exhibited to the District Judge (R. 144), a written acceptance wherein the Ranson-Davidson Investment Company recited that it was "the owner of certain bonds of Everglades Drainage District, aggregating in principal amount $7,005,000.00," and was also "the owner of certain notes executed by The Everglades Drainage District in favor of The Arundel Corporation in the principal amount of $1,825,685.66" (R. 161). The acceptance stated:

"The undersigned accepts and consents to the Plan of Composition" (R. 161).

The District Court entered an Order June 13, 1941, finding that the petition complied with the act, and had been filed in good faith. The order approved the petition as properly filed, and directed the service by publication and mailing of a "Notice to Creditors" (R. 83-85). On June 19, 1941, a further order was entered finding that the petition complied with Chapter IX of the Act, and had been filed in good faith. The order approved the petition as properly filed, directed the service by mailing and publication of a "Notice to Creditors", and recited that it was entered in lieu of the order of June 13 (R. 88-90).

H. W. Kelley moved the Court to vacate the orders of June 13 and 19, and to dismiss the Petition, on the ground that The Ranson-Davidson Co. was not, and had never been, the owner of at least 51% in amount of the securities affected by the plan, and therefore, when the petition was filed, and when the successive orders were entered approving it as properly filed, the plan had never been accepted in writing by creditors owning the requisite percentage of the securities affected (R. 126-129). The other five petitioners made the same motion, and also moved the Court to quash the purported process (R. 130-131).

The verified allegations of the motions were to this effect: The bonds of which The Ranson-Davidson Investment Company claimed to be the owner, had been deposited by their true owners, including petitioners herein, with a bondholders' protective committee, under a deposit agreement which made the committee members trustees of an express trust. The deposit agreement defined and limited the powers of the trustees, and expressly provided that the deposited bonds could not be sold for less than par value, until thirty days advance written notice of the terms of the proposed sale had been given to the depositing owners, except

that the trustees could unilaterally amend the agreement so as to authorize a sale of the deposited bonds at less than par value, but such amendment would not become effective until thirty days written notice had been given to the depositing owners (R. 91-95). On June 6, 1941, seven days before the Petition for Confirmation was filed, the trustees purported to sell the deposited bonds, including those of the Appellants, to a syndicate composed of B. J. Van Ingen Company, Inc., Syndicate Manager, The Ranson-Davidson Company, Inc., John Nuveen & Company, and Fenner & Beane, for a price considerably less than par value (R. 96-100). On the same day, the trustees unilaterally amended the agreement to authorize the purported sale (R. 100-102) and gave the depositing owners written notice of the purported sale and of the amendment (R. 95-102). Neither the purported sale nor the amendment had become effective June 12, 1941, when The Ranson-Davidson Investment Company executed its consent as owner of the bonds, including the bonds owned by petitioners (R. 115), nor on June 13, 1941, when the petition was filed and the original order was entered approving it as properly filed, nor on June 19, 1941, when the second order was entered approving the petition as properly filed (R. 102-117, 126-128, 130-131). By reason of the matters stated, the syndicate members had not become the owners of the bonds at any of the times mentioned, and title thereto remained vested in the trustees, but if any title did pass by reason of the purported sale and the amendment, or either, it passed to the four syndicate members, including The Ranson-Davidson Company, Inc., as joint owners, and was never vested in The Ranson-Davidson Investment Company (R. 102-117, 126-128, 130-131). Consequently, when the acceptance was executed, when the petition was filed, and when the successive orders were entered approving the petition as properly filed, The Ranson-Davidson Investment Company did not own the requi-

site percentage of securities affected by the plan, and the latter had not been accepted in writing by the owners of the necessary percentage of securities.

The Motions were heard September 29, 1941 (R. 133). The District Court ruled that the burden of proof to establish jurisdiction was on Respondent (R. 147). The latter called S. H. Ranson, Jr., as a witness on its behalf (R. 149). He testified: I am Vice-President of Ranson-Davidson Company (R. 149). The name was recently changed from Ranson-Davidson Investment Company to Ranson-Davidson Company, Inc. (R. 149). The Bonds were purchased from the committee by the B. J. Van Ingen Company, Incorporated, Fenner & Beane, John Nuveen & Company, Inc., and Ranson-Davidson Company, Inc. (R. 150-151). My company had only a 28% undivided ownership in them (R. 151). B. J. Van Ingen & Company had a 28% undivided ownership, John Nuveen & Company had a 28% undivided ownership, and Fenner & Beane had a 16% undivided ownership (R. 151). This situation existed at the time the acceptance was executed by The Ranson-Davidson Investment Company. The acceptance is predicated partially on interest coupons which are in judgment (R. 152-153). The title to the judgment was in Van Ingen Company at the time the acceptance was signed (R. 154).

No evidence was adduced to overcome the verified allegations of the Motions concerning the limited powers of sale conferred by the Deposit Agreement. The verified allegations of the terms of the Deposit Agreement, and of the date, terms and manner of sale, were uncontradicted. The verified allegation that the acceptance included the Bonds owned by Petitioners was also uncontradicted.

In addition to the testimony of Mr. Ranson, Respondent adduced, and the District Court admitted in evidence:

1) the acceptance executed by The Ranson-Davidson Investment Company (R. 161); 2) an instrument which had not been exhibited to the Court at any prior time, dated June 10, 1941, executed by each of the four syndicate members, authorizing The Ranson-Davidson Investment Company or S. H. Ranson, Jr., its vice-president, or both, "to execute on behalf of said Syndicate and each of the members thereof, a consent or acceptance of" the Plan of Composition, "in such form, and as fully, as though The Ranson-Davidson Investment Company, or S. H. Ranson, Jr., were the sole owner of said bonds or notes" (R. 164-165); 3) an instrument executed by each of the four syndicate members, wherein "the act of The Ranson-Davidson Investment Company and of S. H. Ranson, Jr., in accepting the Plan of Composition", was "fully ratified on behalf of said Syndicate and on behalf of each of the members thereof" (R. 166-167).

The District Court denied the Motions (R. 161, 170-171), allowed the Petitioners ten days from September 29, 1941, to file Answers and Objections, appointed a Master to take testimony and report his Findings of Fact and Conclusions of Law, and directed that the taking of testimony before the Master begin October 1, 1941 (R. 171-172).

Petitioners appealed from the Order denying the Motions and appointing the Master (R. 172).

On October 1, 1941, at the subsequent hearing before the Master, Respondent submitted a number of additional acceptances, including an acceptance by Reconstruction Finance Corporation as the purported purchaser, pendente lite, of the greater part of the bonds involved in the attempted sale by the bondholder's committee (R. 177, 181, 183). All of the additional acceptances were obtained after the Petition for Confirmation had been filed, and after the successive orders were entered approving the Petition as properly filed, and after Petitioners herein had moved

to dismiss the Petition. The additional acceptances were not presented to or before the District Court when the Motions to Dismiss were denied (R. 177-187).

On April 13, 1942, Respondent moved to dismiss the Appeal, or, in the alternative, to postpone the hearing thereof until an Appeal should be taken from the Interlocutory Decree which had been subsequently rendered by the District Court (R. 194-196). Attached to the Motion was a certified copy of an extract from the Report of the Master (R. 197) and a certified copy of the Interlocutory Decree Confirming Plan of Composition, as amended (R. 200-207).

On May 7, 1942, the Circuit Court of Appeals affirmed the Order of the District Court (R. 215) because: (a) the contentions of Petitioner are technical in the extreme; (b) it is not shown that Ranson-Davidson Company attempted to consent to the Plan of Composition for the bonds owned by any objecting creditor; (c) the members of the syndicate did not object to, but expressly authorized, ratified and approved the action taken by Ranson-Davidson Company; (d) the holders of over 90% in amount of the indebtedness consented to and accepted the Plan; (e) the holders of only 2½% of the indebtedness objected to confirmation of the Plan; (f) after the filing of the Petition for Confirmation, Reconstruction Finance Corporation was authorized by the Court to acquire the bonds held by Ranson-Davidson Company, and thereafter acquired the bonds and accepted the Plan; (g) the appeal did not raise issues respecting the equity or fairness of the Plan, which had been confirmed by the District Court after the coming in of the Master's Report and a hearing; (h) no good purpose could be served by reversing the cause for alleged technical defects in and about the filing of the Petition, and requiring Respondent to start over again at the beginning, as such procedure would result in much

delay and would put Respondent and the creditors to additional, unnecessary, and useless expense; (i) the issues of fact and of law raised by the Motions to Dismiss were fully heard and considered by the trial Court, and its ruling was fully supported.

Petition for Rehearing was filed May 26, 1942 (R. 219), and denied June 2, 1942 (R. 224).

## II.

### Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals was rendered on May 7, 1942 (R. 218). A Petition for Rehearing, filed May 26, 1942, was denied June 2, 1942 (R. 224). This Petition for writ of certiorari is filed July 14, 1942.

The questions presented are substantial in that they attack the jurisdiction of the District Court as a Court of Bankruptcy.

The District Court, subsequent to the Order denying Petitioners' Motions to Dismiss, confirmed the Plan of Composition (R. 200). It is not known how much it would cost Petitioners to appeal from the Interlocutory Decree, but it is estimated that the cost would be approximately $5,000.00, and if Petitioners' contention on the question of jurisdiction is well founded, the Interlocutory Decree is void.

## III.

### Questions Presented.

This Petition presents the following questions:

1. When a Petition is filed under Sec. 83(a) of the Bankruptcy Act for the confirmation of a Plan of Composition which has not been accepted in writing by the owners of at least 51% in amount of the securities affected, does the District Court acquire jurisdiction of the subject matter of the proceeding?

2. When a Petition for confirmation of a Plan of Composition is filed under the circumstances stated in the first question, and Motions to Dismiss the Petition are made before the Plan of Composition is accepted in writing by the owners of the required percentage of the securities affected, should the Petition be dismissed?

3. When a Petition for confirmation of a Plan of Composition is filed under the circumstances stated in the first question, can the subsequent purported ratification of an ineffective acceptance, or the subsequent obtaining of acceptances from the owners of the required percentage of the securities affected, retroactively confer jurisdiction of the subject matter and of creditors who did not appear generally?

## IV.

### Reasons Relied On for Allowance of Writ.

Petitioners respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit:

(a) Is in conflict with the rule announced in *Ouerbacker* v. *Henderson County*, 4 Cir., 126 F. 2d 309.

(b) Countenances an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

(c) By giving as its rationale that to reverse the District Court "would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense," is a premature pronouncement that the Plan of Composition complies with the requirements of the Act (other than the deficiency of initial acceptances) and is so far afield from the usual and accepted course of judicial procedure as to call for the exercise of the Supreme Court's power of supervision.

(d) Imposes on Petitioners the burden of expending a further sum of approximately $5,000.00 to appeal from an Interlocutory Decree which the District Court was without power to render.

V.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith exhibited, and made a part hereof, in compliance with Rule 38 of this Court.

Wherefore, your petitioner prays that a Writ of Certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send up to this Court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its Docket No. 10,111, H. W. Kelley and others, Appellants, versus Everglades Drainage District, Appellee, to the end that said cause may be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and

corrected, as provided by law; that upon the hearing by this Honorable Court, the judgment below be reversed, and that such further proceedings be held herein as may be provided by law and equity.

MILLER WALTON,
*Attorney for Petitioners.*